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 Plaintiff, Marks Studios, LLC*

**UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA**

KONAMI GAMING, Inc., a Nevada  
 corporation,

Plaintiff,

v.

MARKS STUDIOS, LLC d/b/a Gimmie  
 Games, a Georgia limited liability company,

Defendant.

CASE NO.: 2:14-cv-01485-JAD-CWH

**STIPULATION AND [PROPOSED]  
 ORDER REGARDING DISCOVERY,  
 INCLUDING DISCOVERY OF  
 ELECTRONICALLY STORED  
 INFORMATION (“ESI”)**

MARKS STUDIOS, LLC d/b/a Gimmie  
 Games, a Georgia limited liability company,

Counterclaim-Plaintiff,

v.

KONAMI GAMING, Inc., a Nevada  
 corporation,

Counterclaim-Defendant.

1 WHEREAS, the parties have discussed and agreed on the following procedures to  
2 govern Discovery;

3 NOW, THEREFORE, SUBJECT TO THE COURT'S APPROVAL, IT IS  
4 HEREBY STIPULATED AND AGREED, by and among the parties, through their undersigned  
5 counsel, that:

6 **I. General Provisions**

7 **A. Cooperation.**

8 Parties are expected to reach agreements cooperatively on how to conduct  
9 discovery under Fed. R. Civ. P. 26–36. In the event that the parties are unable to agree on the  
10 parameters and/or timing of discovery, the following default standards shall apply until further  
11 order of the Court or the parties reach agreement.

12 **B. Proportionality.**

13 Parties are expected to use reasonable, good faith and proportional efforts to  
14 preserve, identify and produce relevant information.<sup>1</sup> This includes identifying appropriate  
15 limits to discovery, including limits on custodians, identification of relevant subject matter, time  
16 periods for discovery and other parameters to limit and guide preservation and discovery issues.

17 **C. Preservation of Discoverable Information.**

18 A party has a common law obligation to take reasonable and proportional steps to  
19 preserve discoverable information in the party's possession, custody or control.  
20

21 Absent a showing of good cause by the requesting party, the parties shall not be  
22 required to modify, on a going-forward basis, the procedures used by them in the ordinary course  
23 of business to back up and archive data; provided, however, that the parties shall preserve the  
24 non-duplicative discoverable information currently in their possession, custody or control.  
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26 **D. Privilege.**

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<sup>1</sup> Information can originate in any form, including ESI and paper, and is not limited to information created or stored electronically.

1 (i) The parties are to confer on the nature and scope of privilege logs for the  
2 case, including whether categories of information can be excluded from any logging  
3 requirements and whether alternatives to document-by-document logs can be exchanged.

4 (ii) With respect to information generated after the filing of the complaint,  
5 parties are not required to include any such information in privilege logs.

6 (iii) Activities undertaken in compliance with the duty to preserve information  
7 are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

8 (iv) In accordance Fed. R. Evid. 502, the parties agree that information that  
9 contains privileged matter or attorney work-product shall be immediately returned if such  
10 information appears on its face to have been inadvertently produced or if notice is provided  
11 within a reasonable time after inadvertent production. To the extent that the receiving party does  
12 not believe the production was inadvertent, it may keep a single copy of the allegedly  
13 inadvertently produced material for use solely in connection with a motion challenging the claim  
14 of inadvertence, which must be filed within one week of receiving a request for the return of the  
15 challenged material. In determining such motion, any delay from the time of production to the  
16 producing party's identification of the challenged material as privileged shall not be considered,  
17 but the Court may consider as relevant any delay from the time that the document was identified  
18 as specifically relevant or potentially privileged by the receiving party, whether by use in an  
19 interrogatory response, deposition, or otherwise, to the time that the producing party identifying  
20 the document as privileged and inadvertently produced. Pursuant to Rule 502(d) of the Federal  
21 Rules of Evidence, the Court orders that no waiver of privilege shall be found in this or any other  
22 action or proceeding on the basis of any such production in this action found by the Court or  
23 acknowledged by the parties to be inadvertent.  
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27 **II. Initial Disclosures.**  
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1           Within seven days of the lifting of the stay on general discovery provided in the  
2 Initial Scheduling Order, each party shall disclose:

3           **A.     Custodians.**

4           The 5 custodians most likely to have discoverable information in their possession,  
5 custody or control, from the most likely to the least likely shall be identified by name, title, role  
6 in the instant dispute, and the subject matter of the information, to the extent that the party has 5  
7 such custodians. In the event that a party has fewer than 5 custodians, the party will identify  
8 those custodians.  
9

10          **B.     Non-custodial data sources.<sup>2</sup>**

11          A list of the non-custodial data sources that are most likely to contain non-  
12 duplicative discoverable information for preservation and production consideration, from the  
13 most likely to the least likely.

14          **C.     Notice.**

15          The parties shall identify any issues relating to:

16               (i)     Any ESI (by type, date, custodian, electronic system or other criteria) that  
17 a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(C)(i).  
18

19               (ii)    Third-party discovery under Fed. R. Civ. P. 45 and otherwise, including  
20 the timing and sequencing of such discovery.

21               (iii)   Production of information subject to privacy protections, including  
22 information that may need to be produced from outside of the United States and subject to  
23 foreign laws.  
24

25          Lack of proper notice of such issues may result in a party losing the ability to  
26 pursue or to protect such information.  
27

28          <sup>2</sup> That is, a system, repository or container that stores ESI, but over which an individual custodian does not organize, manage or maintain the ESI in the system, repository or container (e.g., enterprise system or database).

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2 **III. Specific E-Discovery Issues.**

3 a. On-site inspection of electronic media. Such an inspection shall not be permitted  
4 absent a demonstration by the requesting party of specific need and good cause. The parties  
5 agree inspections, either on-site or off-site, will be reasonably provided for the relevant games or  
6 copies of the relevant games will be provided in lieu of any inspection.

7 b. Search methodology. If the producing party elects to use search terms to locate  
8 potentially responsive ESI, then in advance of its search, it shall disclose the search terms to the  
9 requesting party. Absent a showing of good cause, a requesting party may request no more than  
10 10 additional terms to be used in connection with the electronic search. Appropriately focused  
11 terms, rather than over-broad terms (e.g., product and company names), shall be employed. The  
12 producing party shall search (i) the non-custodial data sources identified in accordance with  
13 paragraph III(b); and (ii) emails and other ESI maintained by the custodians identified in  
14 accordance with paragraph III(a). The parties agree that archives and back-up media do not have  
15 to be searched unless the requesting party demonstrates good cause for such a request.  
16

17 c. Format. Except as otherwise provided for in this Stipulation ESI and non- ESI  
18 shall be produced to the requesting party as text searchable image files (e.g., PDF or TIFF) at a  
19 resolution of at least 300 dpi. When a text-searchable image file is produced, the producing  
20 party must preserve the integrity of the underlying ESI – i.e., the original formatting, the  
21 metadata (as noted below) and, where applicable, the revision history. The parties shall produce  
22 their information in the following format: full text searchable PDF or single page TIFF images  
23 and associated multi-page text files containing extracted text or OCR with Concordance (dat)  
24 and Opticon (opt) load files containing all requisite information including relevant metadata.  
25 The parties shall produce email attachments sequentially after the parent email. For documents  
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1 which already exist in PDF format prior to production (i.e., which the producing party receives  
2 from a client or third party in PDF format), the producing party may provide them in that same  
3 PDF format, whether searchable or non-searchable. For documents converted to PDF format  
4 prior to production, the producing party shall make reasonable efforts to convert to searchable  
5 PDF.

6 d. Native files. The only files that should be produced in native format are files not  
7 easily converted to image format, such as Excel and Access files. This Stipulation does not  
8 govern access to source code, which shall be made accessible pursuant to a Protective Order  
9 entered in this case.  
10

11 e. Requests for hi-resolution or color documents. The parties agree to respond to  
12 reasonable and specific requests for the production of higher resolution or color images. Nothing  
13 in this Stipulation shall preclude a producing party from objecting to such requests as  
14 unreasonable in number, timing or scope, provided that a producing party shall not object if the  
15 document as originally produced is illegible or difficult to read. The producing party shall have  
16 the option of responding by producing a native-file version of the document. If a dispute arises  
17 with regard to requests for higher resolution or color images, the parties will meet and confer in  
18 good faith to try to resolve it.  
19

20 f. Load File fields. The parties are only obligated to provide the following metadata  
21 for all ESI produced to the extent such metadata exists. The parties are not obligated to include  
22 metadata for any document that does not contain such metadata in the original, if it is not  
23 possible to automate the creation of metadata when the document is collected, or if the document  
24 was previously collected and the metadata is absent in the previous collection. Metadata fields  
25 which should be produced, if available: Volume, DOC ID, Custodian, File Path, Email Subject,  
26 Conversation Index, From, To, CC, BCC, Date Sent, Time Sent, Date Received, Time Received,  
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1 Filename, Author, Date Created, Date Modified, MD5 Hash, File Size, File Extension, Control  
2 Number Begin, Control Number End Attachment Range, Attachment Begin, and Attachment  
3 End (or the equivalent thereof). In the event a producing party produces documents from a  
4 previous collection in which any of the metadata specified herein was not also collected, the  
5 producing party shall respond to requests, on a document-by-document basis, for additional  
6 metadata, to the extent such additional metadata is reasonably available. Nothing in this  
7 Stipulation shall preclude a producing party from objecting to such requests as unreasonable in  
8 number, timing or scope.  
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10 g. Databases. Certain types of databases are dynamic in nature and will often  
11 contain information that is neither relevant nor reasonably calculated to lead to the discovery of  
12 admissible evidence. Thus, a party may opt to produce relevant and responsive information from  
13 databases in an alternate form, such as a report or data table. These reports or data tables will be  
14 produced in a static format. The parties agree to identify the specific databases, by name, that  
15 contain the relevant and responsive information that parties produce. The parties agree to  
16 respond to reasonable and specific requests for the production of additional information  
17 regarding the database such as relevant underlying formulae. If a dispute arises with regard to  
18 requests for additional database information, the parties will meet and confer in good faith to try  
19 to resolve it.  
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21 h. Production media and encryption of productions. Unless otherwise agreed, the  
22 parties shall provide document productions in the following manner: The producing party shall  
23 provide the production data on CDs, DVDs, external hard drives, or electronically via File  
24 Transfer Protocol (FTP) as appropriate. The producing party may encrypt the production data  
25 using a suitable encryption program, such as TrueCrypt, and if it does, the producing party shall  
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1 forward the password to decrypt the production data separately from the CD, DVD, external  
2 drive, or FTP site on which the production data is saved.



1 Dated: March 17, 2015

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1 Dated: March 17, 2015

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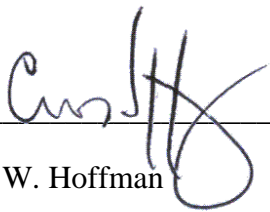
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14 *Attorneys for Plaintiff Konami Gaming, Ltd.*

17 **ORDER**

18  
19 **PURSUANT TO THE STIPULATION, IT IS SO ORDERED:**

20  
21  
22 Dated: March 18, 2015

23  
24  
25  
26   
27 Carl W. Hoffman

28 United States Magistrate Judge